

CONSTRUCTION

TIPS

SPECIAL EDITION



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Subcontractor Prompt Payment

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Overview

Federal regulations and state law require contractors and their subcontractors to pay within 10 days of receiving payment. This requirement includes the release of retainage when a subcontractor's work is complete, even if final acceptance has not occurred. Article 9.6.B of the department's Standard Specifications and associated special provision states the following:

"For the purposes of this Article only, the term subcontractor includes suppliers and the term work includes materials provided by suppliers at a location approved by the department. Pay the subcontractor for work performed within 10 days after receiving payment for the work performed by the subcontractor. Also, pay any retainage on a subcontractor's work within 10 days after satisfactory completion of all of the subcontractor's work. Completed subcontractor work includes vegetative establishment, test, maintenance, performance, and other similar periods that are the responsibility of the subcontractor.

For the purpose of this Section, satisfactory completion is accomplished when:

- *the subcontractor has fulfilled the contract requirements of both the department and the subcontract for the subcontracted work, including the submittal of all information required by the specifications and the department; and*
- *the work done by the subcontractor has been inspected and approved by the department and the final quantities of the subcontractor's work have been determined and agreed upon.*

The inspection and approval of a subcontractor's work does not eliminate the Contractor's responsibilities for all the work as defined in Article 7.14, "Contractor's Responsibility for Work."

The Department may pursue actions against the Contractor, including withholding of estimates and suspending the work, for noncompliance with the subcontract requirements of this Section upon receipt of written notice with sufficient details showing the subcontractor has complied with contractual obligations as described in this Article.

These requirements apply to all tiers of subcontractors. Incorporate the provisions of this Article into all subcontract agreements."

The DBE special provision now includes a requirement for certification of payment to all subcontractors and suppliers, not just DBEs. Obtain these certifications from the prime contractor, monthly, following the month payment was made by the department. If no work is performed and no payment is issued by the department, submission of the form is not required.

Procedures

Form 2177, Prompt Payment Certification

Prime contractors must submit Form 2177, *Prompt Payment Certification*, to the Area Engineer. This form certifies that all subcontractors and suppliers were paid within 10 days of receiving payment from the department for work performed during the previous month and retainage was released for those subcontractors and suppliers whose work is complete. The prime contractor must submit the completed form monthly during the project and the month following final acceptance of the project. In addition, the 10-day prompt payment requirement prevails over contract language between a prime contractor and a subcontractor or supplier. Initiate the following actions for receipt and review of the required certification form:

1. Verify that the form is received by the due date and that any payments withheld are based on a dispute and file the form. (A dispute is a disagreement between the contractor and a first-tier subcontractor regarding payment as it relates to a contractual issue. In the normal course of business, billing errors occur. Routine billing errors submitted by a subcontractor or supplier will not be considered a dispute until elevated by the contractor, subcontractor or supplier.)
2. If payment is withheld without a stated dispute or the prime contractor fails to provide the monthly or final certifications, take necessary actions. To begin with, contact the prime contractor to remind them of their contractual obligation. Escalated actions may include suspension of work, withholding all or a portion of an estimate, withholding project acceptance, default for breach of contract or other actions as deemed appropriate.

Prompt Payment Complaints

For prompt payment complaints, require subcontractors to submit complaints in writing. The complaint should identify specifics regarding the subcontract language, items of work in question, and the subcontractor's attempts to obtain payment from the prime contractor. Do not accept a complaint until the subcontractor provides satisfactory written evidence that they have contacted the prime contractor and their payment bond surety in an attempt to resolve the issue. If a complaint is accepted, follow the procedures outlined below:

1. Verify the work in question has been approved by the department.
 - a. If the work or materials in question have not been approved by the department, notify the prime contractor and subcontractor that no prompt payment issue exists. (*No further department action necessary related to prompt payment.*)
 - b. If the work was approved, determine if payment was made by the department.
 - i) If payment was not made, make payment to the prime contractor and notify the parties involved of the resolution. (*No further department action necessary related to prompt payment.*)
 - ii) If the department paid for the work or materials, go to step 2.
2. Determine if a dispute exists by referring to prompt payment certifications and other supporting information. (Supporting information to aid in the determination of a plausible dispute or resolution of a dispute may include subcontractor or supplier agreements, invoices, subcontract or supplier agreement revisions [change orders], cancelled checks, identification of billing errors, etc.)
 - a. If it is determined that a dispute exists, advise the subcontractor that they may file against the payment bond surety. Forward the subcontractor's letter to the prime contractor with a letter advising them of their responsibility to work with the subcontractor to resolve the dispute. Provide copies of the prime contractor letter to both the subcontractor and payment bond surety. (*No further department action necessary related to prompt payment.*)
 - b. If it is determined that a dispute does not exist, forward the subcontractor's letter to the prime contractor with a copy to the payment bond surety. Request payment or justification for non-payment. Set a response deadline.
 - i) If the prime contractor makes payment or provides documentation that substantiates the dispute, forward the response to the subcontractor and advise that payment was made or a dispute exists. Send a copy of the subcontractor notice to the payment bond surety. In instances of a dispute, advise that it is the responsibility of the parties involved to resolve the issue. (*No further department action necessary related to prompt payment.*)
 - ii) If the prime contractor has not made payment and does not provide justification of a dispute within the timeframe specified, initiate the appropriate administrative action. Possible administrative actions include: suspension of work, withholding all or a portion of an estimate, withholding project acceptance, default for breach of contract or other actions as deemed appropriate.

Second tier complaints should be forwarded to and addressed by the prime contractor with a copy of the prime contractor's notice sent to the payment bond surety.

Ensure that notices associated with prompt payment are received by the prime contractor and subcontractor prior to the 20th calendar day from the date of the subcontractor's written notice.

Contact Information

If you have any questions regarding this information, please contact the Construction Section at 512/416-2532.